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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-194

In the Matter of

Amendment of Section 73.202(b). RM-8052
Table of Allotments. RM-8121
FM Broadcast Stations.
(Essex and Needles, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 23, 1995;

Released: July 5, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 5912 (1993), proposing the allotment of Channel 280B to Essex, California, as that community's second local FM service, in response to a request filed on behalf of Dunes Broadcasting. Petitioner filed supporting comments reiterating its intention to apply for Channel 280B, if allotted to Essex, as requested. Comments and a counterproposal were filed on behalf of David A. Petrick ("Petrick").¹ Responsive comments were filed by petitioner, Petrick and Chris Sarros ("Sarros").²

2. In response to the *Notice*, Petrick counterproposed the allotment of Channel 280B to Needles, California, in lieu of its consideration at Essex.³ In support of his proposal, Petrick identifies Needles as a "growing community with a 1990 U.S. Census population of over 5,000 persons." In further support of his proposal Petrick questions the community status of Essex for allotment purposes, regardless of the fact that it was previously allotted an FM channel. Petrick remarks that Essex is merely a geographical locality having no meaningful population and lacking the commonly recognized attributes of a community, citing *Hannahs Mill, Georgia*, 7 FCC Rcd 3944 (1992) and *East Hemet, California*, 4 FCC Rcd 7895 (1989). Further, Petrick comments that although the *Notice* did not request demographic information, presumably since Essex has an FM

allotment, due to changed circumstances in the composition of the community since the earlier FM allotment was made, and in the absence of a further demonstration by the petitioner that Essex merits community status, the proposal should be denied, regardless of whether there may be any mutually-exclusive proposal under consideration.

3. The requests to allot Channel 280B to Essex and to Needles are mutually exclusive as they are separated by less than the required minimum distance of 241 kilometers between Class B co-channel allotments. As indicated in footnote 3, *supra*, in an effort to accommodate both proposals, the staff determined the availability of another Class B channel (Channel 296B) to accommodate Petrick's desire to provide an additional FM service to Needles.⁴ Therefore, we are not required to address Petrick's counterproposal further. However, in light of Petrick's allegations surrounding the community status of Essex for allotment purposes, we believe it is necessary to distinguish the instant proposal from proceedings in which the Commission has reversed its presumption of community status.

4. We note that in 1988, the Commission considered a request to allot an FM channel to Essex based upon the petitioner's intention to serve not only the needs and interests of that locality, but also to provide a much needed service to the large mobile population travelling daily in remote areas along Interstate 40. See 3 FCC Rcd 5403 (1988). In making the ultimate determination to allot an FM channel to Essex in MM Docket No. 88-397, the Commission stated that "Congressional intent in enacting Section 307(b) of the Communications Act in its present form was to provide the Commission with greater discretion in distributing frequencies, and to remove uniform but somewhat artificial barriers to the initiation of service in sparsely populated areas," citing, e.g., H.R. Rep. No. 2589, 74th Cong., 2nd Sess. 3 (1936). See 4 FCC Rcd 8084 (1989). Although Essex may contain a small population, it is located in a portion of California near the Nevada border, as is Needles, which is sparsely populated with few significant communities. If we were to deny the Essex proposal based upon Petrick's assertions, we would simply frustrate Congress' intent in enacting Section 307(b) of the Communications Act. Moreover, we previously found in the 1988 proceeding, *supra*, that Essex qualified as a community for allotment purposes and a construction permit has been issued for Station KHXY(FM) to operate on Channel 255B at Essex. As none of the cases cited by Petrick involved the denial of an allotment to a community containing authorized broadcast facilities, we find no justifiable reason to challenge the petitioner's request to allot Channel 280B to Essex.

¹ Public Notice of the counterproposal was given November 20, 1992, Report No. 1918.

² Sarros was the petitioner to allot Channel 280A to Bagdad, Arizona, in MM Docket No. 92-48. As his comments relate solely to Petrick's suggested substitution of a channel at Bagdad to accommodate the counterproposal in this proceeding, they are moot in view of the determination reached in MM Docket No. 92-48 to allot Channel 280A to Bagdad. See footnote 3, *infra*. Therefore, Sarros' comments will not be discussed in this proceeding. See 8 FCC Rcd 2168 (1993).

³ To accommodate his proposal, Petrick also requested the substitution of Channel 242A for Channel 280A at Bagdad, Arizona, in MM Docket No. 92-48. Petrick's counterproposal was filed after the close of the comment period in the Bagdad proceeding,

and could not be considered therein. However, in MM Docket No. 92-48 we stated that in an effort to accommodate all parties, an alternate Class B channel was found to be available for consideration at Needles, and would be addressed in the context of the instant proceeding. See 8 FCC Rcd 2168 (1993). We wish to clarify, however, that had an alternate channel not been available for consideration at Needles, Petrick's counterproposal would have been rejected in this proceeding as counterproposals must be technically and procedurally correct at the time of their filing. See *Fort Bragg, California*, 6 FCC Rcd 5817 (1991).

⁴ In light of the availability of an alternate channel at Needles, petitioner's comments in reference to Petrick's counterproposal are now moot and will not be discussed.

5. In view of the above, we believe the public interest would be served by the allotment of Channel 280B to Essex, California, and Channel 296B to Needles, California, since the proposals could provide an additional local FM service to each community. As indicated in the *Notice*, Channel 280B can be allotted to Essex without a site restriction, at coordinates 34-44-12 and 115-14-48. Channel 296B can be allotted to Needles without the imposition of a site restriction at coordinates 34-50-36 and 114-36-54. As Essex and Needles are each located within 320 kilometers (199 miles) of the United States-Mexico border, concurrence in the proposals was obtained from the Mexican government.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED. That effective **August 21, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with regard to the communities listed below, as follows:

City	Channel No.
Essex, California	255B, 280B
Needles, California	250C1, 296B

7. IT IS FURTHER ORDERED. That this proceeding IS TERMINATED.

8. The window period for filing applications on Channel 280B at Essex, California, and on Channel 296B at Needles, California, will open on **August 21, 1995**, and close on **September 21, 1995**.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 280B at Essex, California, and Channel 296B at Needles, California, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau